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SENSITIVE
SIPDIS

STATE FOR EAP/CM SECOR/YAMAMOTO
State for INL - Jvigil
USTR for China Office - AWinter; IPR Office - RBae;
and OCG - SMcCoy
Commerce for National Coordinator for IPR Enforcement
Commerce for WPaugh, NWinetke
Commerce for MAC 3204/LRigoli, ESzymanski
Commerce for MAC 3042/SWilson, JYoung
LOC/Copyright Office - STepp
USPTO for Int'l Affairs - LBoland, EWu
DOJ for CCIPS - MDubose and SChembtob
FTC for Blumenthal
FBI for LBryant
DHS/ICE for IPR Center - Dfaulconer, TRandazzo
DHS/CBP for IPR Rights Branch - GMacray, PPizzeck
ITC for LLevine, LSchlitt
State for White House OTP Ambassador Richard Russell

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TAGS: [ETRD](#) [KIPR](#) [ECON](#) [CH](#)
SUBJECT: USITC IS AN INDEPENDENT AGENCY

¶1. (SBU) Summary. On March 25, 2008, International Trade Commission (ITC) Chairman Daniel Pearson met with Ministry of Commerce (MOFCOM) Vice Minister (V/M) Yi Xiaozhun and Director General (DG) Li Ling. V/M Yi proposed closer cooperation on information sharing and said China wants to work with the United States to lower multilateral trade barriers. DG Li expressed concern about United States firms' "abuse" of Section 337 filings and Unites States Department of Commerce's (DOC) use of data from surrogate countries in antidumping calculations involving nonmarket economies. Pearson said the United States is open to more cooperation and sought MOFCOM's assistance in gathering data for an analysis requested by Congressman Rangel. He said the ITC was an independent agency, known for balanced reports that helped defuse political pressure in the bilateral trade relationship. End Summary.

V/M Yi Proposes Closer Cooperation

¶2. (SBU) V/M Yi proposed closer and more constructive cooperation between the ITC and MOFCOM, especially the sharing of customs and statistical data. Yi said open trade was in both countries' interests. China wanted to work with the United States toward further liberalization at the WTO and in the Doha round. There was room for the United States to decrease agricultural subsidies, he said. Yi noted that half of 337 cases were settled before judgment was rendered. Chairman Pearson agreed that agricultural subsidies were distorting. He noted there had been a large

increase in the caseload of Section 337 investigations, reflecting the growing inter-connectedness of the global economy. He added that requests for anti-dumping investigations were not initiated by the United States, but by industry. In outlining the ITC's mandate, Pearson explained that Congress and USTR routinely ask the ITC to conduct studies on the trade policies and practices of other countries. Congressman Rangel had made such a request related to China.

DG Li Expresses Concern About 337 Abuse...

13. (SBU) DG Li, who formerly was the leading MOFCOM official supporting the now-stalled bilateral IPR dialogue, relayed that MOFCOM's Bureau of Free Trade (BOFT), which she currently oversees, is responsible for supporting Chinese responses to section 332 and 337 investigations. China is a major target of section 337 investigations, in particular, she said. China is concerned about United States firms' abuse of the 337 statute. Litigation costs are high. Intellectual property right (IPR) holders target Chinese small and medium-sized enterprises that cannot afford to defend themselves. The general exclusion orders of the statute leads to exclusion of products from firms that may not have known about the cases. DG Li requested that the United States postpone the deadline for comments on revisions to the 337 process until the end of April so that MOFCOM could submit

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detailed comments. [Note: USG agencies may wish to note that MOFCOM intends to submit comments on these revised rules, yet Chinese agencies have recently denied opportunities for USG to provide comments on draft IPR-related rules, particularly patent law amendments, in light of China's determination to suspend bilateral IPR cooperation. End Note]

14. (SBU) In response to DG Li's point on the severity of general exclusion orders, ITC Chief of Staff Mary Beth Jones noted that general exclusions were not granted automatically. Rather, they were granted when the infringing producers were hard to find or had resisted being identified, or when there was a public interest in the matter, such as excluding potentially unsafe infringing products, like pharmaceuticals. In addition, if the administrative law judge hearing the case recommended a general exclusion order, the recommendation had to be approved by a majority of the ITC's six committee members.

...and Use of Data from Surrogate Countries in CVD Analysis

15. (SBU) DG Li said economists at ITC agreed that ITC's practice of using data from surrogate countries in countervailing duties (CVD) cases was inappropriate. Recent cases used the price of land in Thailand as a substitute for the price of land in China, which was "very irrational." DOC faced problems responding to many cases because it does not recognize China's market economy status, which results in unfair practices toward Chinese firms, Li said. China wished to invite ITC economists to visit so that they could better understand the reality of China's economy. Through more exchanges, China hoped to help the ITC develop a more comprehensive grasp of the "Chinese situation" and Chinese efforts to protect IPR. [Note: China has periodically complained about national treatment and "fairness" in Section 337 cases. In a separate development MOFCOM Director An Baisheng at a

seminar on April 7 hosted by East China University of Politics and Law noted that he was "pessimistic" that China would bring a WTO case against the United States for lack of national treatment in Section 337 cases, despite other countries having brought such cases in the past. End Note]

16. (SBU) Pearson said he thought there was a chance that in his lifetime China could come to be regarded as a market economy given the degree of policy evolution. He noted that China resorts to anti-dumping cases liberally. China had more anti-dumping orders against the United States than any other country, he said.

United States Open to More Cooperation

17. (SBU) On strengthening cooperation, Pearson noted that ITC staff had visited China in the past, which he supported. Two of four administrative judges had come

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in the past year. With the increase in filings and staffing shortages, it would be difficult to arrange more visits in the short-term. Embassy Patent and Trademark Office (USPTO) Senior Intellectual Property Rights (IPR) Attach Mark Cohen added that the Embassy had proposed cooperation on patent enforcement, including Section 337 and been turned down as recently as the prior week by local Chinese governments. He stated that it was difficult to consider 337 actions separate from other IPR enforcement actions, including a recent increase in civil patent litigation involving China, and the relatively low level of US companies bringing IPR litigation in China. He noted upcoming meetings on (Intellectual Property) IP that touched on Section 337, and that there is a proposed forthcoming visit by Court of Appeals for the Federal Circuit (CAFC) Judge Rader, who would be lecturing in Shanghai in July. He noted that the CAFC handles appeals of Section 337 determinations. Cohen noted that he is willing to help China understand the United States enforcement system, and to exchange views on the Chinese system at the same time, and in a separate exchange he noted that USPTO would be funding programs with State Intellectual Property Office (SIPO) on patent prosecution during late April, which could also assist Chinese companies in better understanding the United States IPR environment.

Pearson Outlines ITC Role and its Independence

18. (SBU) Chairman Pearson replied that the ITC was an independent agency with good analytic skills that sometimes lacked enough data to fully understand China's economy. He agreed that section 337 litigation is expensive. He said 337 was not intended to protect American firms and looked forward to the day when a Chinese firm finds a United States firm infringing on its patent via a product imported from Mexico, in which case it could bring a 337 complaint against the United States firm. Pearson said he doesn't pretend to understand the DOC's methodologies and that United States law did not permit the ITC to pick its own data. That said, while DOC finds unfair pricing 90 percent of the time, ITC conducts the next step in the case - determining whether the pricing had injured United States firms. Over the past ten years, ITC had found that to be the case just 47 percent of the time. He noted that 332 investigations did not lead to remedies, only an economic analysis to better understand the situation. Members of Congress rely on the ITC to provide reports with balanced views, allowing time for political pressures to dissipate.

For the study that Congressman Rangel had requested, it would be helpful to collaborate with the Chinese institutes and agencies that had the information.

RANDT